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RESEARCH ARTICLE

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From a legal perspective to see the evolution and transformation of land tenure institutions in China

Abstract Through the discussion of property rights of land in the People's Republic of China by examining the evolution of legal frameworks governing land institutions and that of the rights embodied, it traces out the development of urban and rural land tenure changes during the pre-reform era (pre-1978) and post-reform era (post-1978). Analysis shows that after thirty years of opening up and orientation towards a market economy, there is still a wide divergence of rights between urban and rural land tenure. Quasi-leasehold system of urban land tenure, accompanied by relatively well-established titling and registration procedures as well as an open market for transaction, has been established. In contrast, although the rural land contracting system has endowed farmers with thirty years of agricultural land usufruct rights and attempts to strengthen farmers' tenure security have been made progressively over the years, farmers are yet not enjoying the full bundles of land rights. Imminent reforms in rural land tenure includes, but not restricted to, the following crucial areas: Farmers' right to mortgage their land, a well-functioning land market, well-defined and just causes for land requisition written in law, a clear delineation of the different roles and rights of the collective and individual farmers.

Keywords land law, land law reform, land tenure, land rights

摘要 通过研究与土地制度法律框架及其所包含的土地权利的变迁来讨论中国土地产权制度的变迁，可勾勒出城市和农村土地制度在改革开放前后（1978 年前后）的变革与发展历程。分析表明，虽然经历了 30 年的市场经济改革，城市土地和农村土地的产权还有很大差异。中国城市土地产权建立了一个类似于西方的土地批租

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制度，与其相呼应的是一个相对完善的土地确权和土地登记制度以及公开的土地交易市场。相比之下，尽管农民被赋予了 30 年的农地使用权和收益权，政府也试图通过立法来确保农村土地承包权的安全性，可是农民们并没有享受到土地权利束中的其他权利。农村土地制度亟待改革的一些领域包括：承包土地的抵押权、运行有效的农地市场、将定义明晰和理由正当的征地范围写入《土地管理法》、对农村集体组织和农民个人的权利与义务的明确划分。

关键词 土地法律，土地法律改革，土地制度，土地权利

Land tenure institution is important for all types of economies, be it capitalist, emerging or the less developed economies. In a capitalist economy, formalized property rights remove any uncertainty of ownership during transaction, which in turn lowers transaction costs and generates economic growth. (De Soto, 2000) In emerging economies, secure tenure is necessary to assure both domestic and foreign investors that their investment is secure and that they can use their investment in a fixed asset (e.g. land) as collateral to borrow from financial institutions. In less developed countries, which are primarily agrarian economies, secure land ownership is the foremost source of guarantee for food and shelter. Aside from economic benefits, the granting of land ownership, as well as proper registration and titling can have positive political and socio-economic consequences, such as empowerment for socially disadvantaged groups.

As one of the most important factors of production inputs,[1] by the definition of economics, land is a scarce resource. Land's nature-endowed scarcity is one of the most pressing socio-economic issues that are being faced by China—the most populous country and fastest-growing economy in the world. In China, to maintain a minimum of 1.8 billion *mu*[2] of agricultural land in order to achieve national food self-sufficiency is one of the basic national policies. Yet, contradictorily, economic development is taking a whopping amount of agricultural land and converting it to construction land. It is no exaggeration to say that land policy takes a more central position in the policy-making arena in China than in any other country. Thus, it is worth probing into how land institutions have evolved and transformed over the years in the framework of a "socialist country with Chinese characteristics". This paper provides a narrative and assessment of land policy changes while special attention is paid to the legalization process, the objectives and ideologies behind legalization, how policies and laws are put into practice, and how the interests of stakeholders in land altered during the process.

This paper contributes to the discussion of land and property rights by examining the evolution of legal frameworks and that of the rights embodied in

[1] Other production input factors are capital, labour and entrepreneurial coordination.
[2] 1 *mu* is equal to 667 m².

them. We will first turn back the clock and have a look at the land tenure revolution after the Communist takeover in 1949: The nationalization of urban land; initial privatization and distribution of rural land followed by agrarian radicalism that created the legacy of collective ownership of land in rural areas that is still in existence today. Then we will proceed to a more in-depth study of tenure transformation in an era of rapid economic reform, during which paid land use systems for urban land and contracted land systems for rural land were adopted and gradually improved. Economic reform is the engine propelling these land tenure changes, while land policies and laws are the lubricant that ensures the healthy functioning of tenure institutions. Thus, the legal dimension of land tenure changes in China is of critical importance for both academic research and public policy formulation.

This research is based primarily on policy documents, including Regulations, Circulars, Decisions and Laws issued by the State Council, National People's Congress (NPC), and Ministry of Land and Natural Resources (MLNR) and other government agencies and land laws. This paper divides the study of land tenure in China into two categories: Urban land and rural land, and two time periods: Before 1978 (pre-reform era) and post 1978 (post-reform era). Each category in each time period will then be subdivided into three broad sections: The first section offers an overview of land policies and the backdrop for legal framework design; the second part is devoted to the actual policies or laws implemented; the last section is an assessment of the impact of land policies/laws with special attention paid to robustness[3], duration[4] and assurance[5] of tenure security. Before we proceed, it is important to hold forth that by "law", the author refers not just to laws passed by the National People's Congress, but also policy directives—which enjoy the same, though lower, legal status as the former in the Chinese context—issued by relevant ministries and the State Council.

1 Pre-reform era

1.1 Urban land

1.1.1 Overview

Lai asserts that before the Communist takeover "the Chinese people had a long history of private property rights in land, unlike many other 'developing' countries which have retained different forms of communal or customary land

[3] It refers to the adequacy of rights.
[4] It refers to the adequacy of land holding period.
[5] It refers to the certainty of rights.

tenure that inhibit development." (Lai, 1995) In fact, the establishment of property rights in China predated the emergence of the English freehold system.[6] Most of the land was under the control of government bureaucrats and a small number of capitalists. In a bid to achieve social equality and to conform to Marxist ideology, soon after 1949 the government started a nationalization process for urban land. After a progressive parade of confiscation, purchase and requisition, by 1982 almost all urban land became state-owned. The path of ownership reform can be described as unidirectional and top-down.

1.1.2 Policies and laws

The Political Consultative Conference Creed in 1949 stated that confiscated bureaucrat and feudal assets and capitals belonged to the people. The City Suburban Land Reform Law passed on 10 November 1950 laid the foundation for this compulsory change. The Law stipulated that the "confiscated suburban land of feudal landlords is to be distributed uniformly by the government to landless farmers. The city municipal government is responsible to hand out land registration certificates in order to protect farmers' land rights". The Direction on the Confiscation of Property of War Criminals, Traitors, Bureaucrat Capitalists and Anti-revolutionaries in 1951 was an additional measure towards state ownership. By the end of 1951, most of the confiscation work had been completed. Starting in 1952, the government began to buy back land occupied by capitalists and private property owners in urban areas. This process lasted for 15 years and ended officially in 1966. The tactic of buying back was used for petit and so-called national capitalists (patriotic capitalists or capitalists of key industrial sectors) because the government could not afford a total collapse of the national economy had it nationalized all the capital. It took rather a gradual approach

Enacted on December 5, 1953, the Measures on State Requisition of Land for Construction Use laid out the principles, procedures and approving authorities and compensations standards for the requisition of remaining urban land. Apart from the policies nationalizing urban land mentioned above, the state-ownership of urban land was reinforced in 1954. The Official Reply of the State Council to the Question about Land-use Fees on Urban and Suburban Land Occupied by State-owned Enterprises, Government Agencies, the Military and Schools stipulated that all these entities were not required to pay rent or land-use fees. In addition, it was later stipulated that local government should grant land to these entities free of charge. Hereupon, China entered into a phase of administrative

[6] Ibid.

allocation of land free of charge without limit for the period of land use. Thus, land became an illiquid commodity.

1.1.3 Assessment

The urban land-use system or property rights system from 1949–1978 can be divided into two stages:

(1) 1949–1955: Dual-track property system. It took some years for the Communist government to nationalize land and other forms of capital. During this gap period, the government began to put its socialist ideology into action, while the old pre-1949 property system was still functioning. In many cities during this period land lease and transfer was still permitted; and real estate appraisal agencies and trust companies operated. In 1952, revenue from land taxes accounted for 38% of total revenue in Shanghai. The dominance of private property ownership gradually shifted to state ownership.

(2) 1956–1978: Free (non-remunerative) land-use system. Capital, labour and land are regarded as the main factors of production in a capitalist economy. However, from a Marxist point of view, only labour has value. Land is worthless without labour working on it. The income of a landed class from land is seen as a form of exploitation of the landless class. (Zhang, 1997) The nationalization (or collectivisation) of land did not merely signify the elimination of the exploitation of the proletariat but also conformed to the ideal of a command economy which was thought to be more efficient and better oriented toward economic reconstruction. Since all factories and land were state-owned, there was also no need for land to have any value because state-owned enterprises paying a price to get state-owned was like taking money out of one pocket and putting it into another.

Starting around 1956, the government began to put the restrictions on the transaction of property into full force. Urban land tax was abolished and a system of free, unlimited duration, state ownership property system was put in place. Land was granted by the government to land users, which were commonly known as *danwei* [7] (work units). Market mechanisms were displaced and users could use land without any charge. This inherently caused low efficiency of urban land use. Although the state was the owner, the actual occupier of land got the real benefits from it.

In a nutshell, the Communist party executed a policy of uniform and compulsory state ownership of all urban land. Land had become a non-commodity as no land market existed. Land was distributed free of charge and

[7] *Danwei* is a work unit, a government agency or a social unit. It is a sphere (workplace) where individuals work, and almost every adult in urban areas belongs to a work unit.

was without any specification on the period of usufruct rights. However, the transferring of land among users was prohibited.

1.2 Rural land

1.2.1 Overview

China was largely an agrarian country with 90% of the population living in the countryside. Nationwide agricultural reforms took place from 1950 to the spring of 1953. Peasants' grievances over land tenure played a crucial role in China's 1949 revolution, and shortly after the communists came to power, they carried out a land reform programme that gave land ownership to the erstwhile tenant farmers. This resulted in a remarkable increase in grain output and productivity. Land distribution before land reform was extremely unequal. As shown in Table 1, fewer than 10% of the landlord and kulak classes owned almost 52% of the arable land, and more than 57% of poor peasants and farm labourers owned just 14.88% of the land.

Table 1 Rural land distribution before 1950 land reform in the mainland of China

Class	**Household** (%)	**Population** (%)	**Land** (%)	**Land/household** (*mu*)	**Land/person** (*mu*)
Landlord	3.79	4.75	38.26	144.11	26.32
Kulak	3.08	4.66	13.66	63.24	9.59
Middle peasant	29.20	33.13	30.94	15.12	3.05
Poor peasants and labourers	57.44	52.37	14.28	3.55	0.89
Other	6.49	5.09	2.86	6.27	1.83

Source: Du (1996), Land Reform in China, p.4.

During the initial post-liberation period, the Chinese government successfully carried out land reform in areas accounting for over 90 percent of the total national agricultural population, and 300 million farmers were granted approximately 47 million hectare of land. The legal foundation for this first round of land reform was the PRC Land Reform Law passed by the Central Government's 8th Conference in June 1950, which stipulated the confiscation of landlords' land, farm animals, tools, surplus food and surplus housing. All the land that had been requisitioned was distributed to poor farmers.

Beginning in the mid-1950s, Chairman Mao introduced collective farming, the conglomeration of which formed the communes in later years. The period from

1949 to 1978 is often termed as the period of socialist transformation of agriculture. The agricultural production structure was divided into three stages: Mutual aid teams, producers' cooperatives (lower-level and higher-level) and communes. Starting in 1952, households up to ten were organized into one mutual aid team by sharing tools, draft animals and labour power. It was a voluntary organization which disbanded after busy farming periods. Next came lower-level and higher-level cooperatives. Lower-level cooperatives were usually consisted of around 50 households, while higher-level cooperatives were made up of a few hundred households. High-level cooperatives were established in 1957. By January 1956, there were 136,000 high-level cooperatives which took in about 30.7% of all farming households; by June there were 312,000 high-level cooperatives which comprised 63.2% rural households; by the end of that year the number of cooperatives increased to 540,000 consisting of 87.8% of rural households. (Shi, 1959) By the end of 1957, more than 90% of farm households had joined high-level cooperatives. (Zhang, 1998) The final advancement to socialist agriculture was characterized by the establishment of communes in 1958, each of which consisted of an average of five thousand households. By the end of that year, rural China was almost fully "communized". It seems that the political leaders' feverish zeal for radicalism was unstoppable. The Great Leap Forward (1957–1962) set unrealistic agriculture production goals which, coupled with natural disasters, brought about devastating famine and loss of lives. Unfortunately, more than a decade of Cultural Revolution (1966–1978) made the situation worse. Social instability was ubiquitous in every walk of life, even the most remote areas were not spared from it; political struggle rather than economic production became the personal as well as national goal; grain production decreased precipitously. During the 1970s, about one-third of the rural population did not have a stable food supply. (Zhang, Li, Shao, 2006)

1.2.2 Polices and laws

The Decision on Agricultural Cooperative Development (Draft) in 1951 laid out central government's rationale for carrying out its organization of collective farming. It pointed out that the fundamental mission of the Communist Party of China was to help farmers organize and realize socialist agricultural production by means of a division into elementary, middle-level and high-level cooperatives. The objective of mutual aid teams or lower-level cooperatives was to avoid the pitfalls of the small-scale farming economy. The emphasis of these two forms of production was income allocation on the basis of labour and capital input contributed by farmers, and the freedom of farmers to join or leave. The driving forces behind the initial collectivization process were: The Decision on

Agricultural Cooperative (Draft)[8] passed on December 15, 1951 and the Agricultural Cooperative Demonstration Rules (Draft)[9] passed on November 9, 1955. The former stressed that the farmers' enthusiasm for private economy should not be neglected or tampered with. It stated that farmers should organize according to mutually beneficial principles and they could withdraw the funds they put in if they decided to leave the cooperative. The latter regulation pointed out that the cooperative members must pool their land together under the direction of cooperative and that farmers could withdraw from the cooperative at will.

The High-level Agricultural Cooperative Demonstration Creed was passed on June 30, 1956. This Creed bestowed the freedom of withdrawal from the cooperatives but also stipulated that those who wanted to withdraw could only do so at the end of a production year; and he/she could take back land of the same quantity and quality. And, those who wanted to join must have their land, animals and tools subjected to collective ownership. Since their land had become collective property, farmers were no longer entitled to the economic returns generated from it.

Communes were established through the mergers of cooperatives under the directive of the Decision on the Question of Establishing People's Communes in Rural Area in 1958. The Revised Draft of Rural People's Commune Work Ordinance in 1962 prescribed a three-level management apparatus—commune, production brigade and production team, with production team being the basic level of accounting, meaning that all land owned and managed by the production team, including private plots, privately farmed hilly land and land sites for rural housing became collective property and thus was prohibited from being rented, bought or sold.

1.2.3 Assessment

The main objective of the 1949 land reform was to change the unequal land distribution and fulfil the promise to the peasants made by the Communist Party of China which was the abolition of feudal land ownership and the realization of farmers' ownership as well as the liberation of production forces to promote agricultural production and the laying of foundations for economic development.[10] Indeed, land reform displaced the landlord class and private ownership and achieved the objective of 'land-for-the-tiller'. The Land Reform Law also recognized farmers' freedom to buy, sell and rent land. In short,

[8] This draft was passed into law on February 15, 1953.
[9] This draft was passed into law on March 17, 1956.
[10] The Land Reform Law of China, Article 1.

farmers had the full bundle of rights which included use right, income right, transfer right and rent right. Land reform kindled farmers' enthusiasm and accelerated production. From 1949–1952, food production increased every year and the average growth rate was 13.14% (China Statistical Yearbooks).

The establishment of Mutual Aid Team (MAT) was regarded as a passage to facilitate the transition from private ownership to collective ownership and to pool resources amongst farmers so as to accelerate agricultural production. Land was still privately owned since mutual aid teams were simply seasonal resource-pooling temporary organizations which had virtually no impact on land ownership. When the MAT was replaced by lower-level cooperatives, farmers could join or leave mutual aid teams at will. Those who did not join or decided to leave could still possess or repossess land they owned, while enjoying use, income, and transfer rights. Although those who joined the cooperative no longer had use and disposal rights, they still had ultimate control of the land as they could leave the MAT had they wished to do so. At this stage, income allocation was still carried out on the basis of contributions from individual farmers and land was still private property.

High-level agriculture cooperatives and communes practised collective ownership. Most of the land was managed by the collective and consequently farmers lost their management and surplus extraction rights. Although in theory farmers could withdraw from high-level cooperatives, they in fact were not allowed to do so by cadres who regarded the size of the cooperative as a measurement of their work achievement. Therefore, farmers lost the repossession right of their land in case of withdrawal. Under people's communes, all land within the boundary of the production team, including private plots and land sites for rural housing was owned by the collective. It is obvious that in high-level cooperatives and communes, farmers lost any sort of transaction rights over the land. Land sites for rural housing were still privately owned by farmers in higher-level cooperatives but were transformed to collective property under the commune system (only farmers' houses were privately owned under this system).

2 Post-reform era

In the Third Plenum of the Party's Eleventh Central Committee in 1978, the previous political line was changed and a decisive policy emphasis was put on "the construction of socialist modernization". China subsequently adopted an "open-door" policy and thereafter market mechanisms were gradually introduced into various aspects of the economy. Foreign investments became indispensable to power the engine of economic growth. However, to attract foreign capital, investors demanded not only access to land but also a clearly defined property

rights system. (Lin, Ho, 2005) Yet, the legalization process of institution change regarding property relations lagged behind economic reform and did not come about until the experiment of paid land usufruct system[11] was tried out in Shenzhen in 1982. Soon after, other cities followed suit.

2.1 Urban land

2.1.1 Overview

The economic reforms that began in 1979 totally transformed the Chinese economy and the urban landscape in a way that was unthinkable and unfathomable even to the keenest observers of China. The situation in China was not one of pure market transition but of a mixed economy based on partial and gradual reform. (Nee, 1989; Bian, Logan, 1996) An important parcel of the reform measures was the "new policy that vigorously pursues reform of urban land" (Wu, 1997) which aimed at reintroducing market mechanisms to land and other sectors of the economy.

The cautious government did not immediately start across-the-board urban land reforms. Instead it first experimented with the idea of a land market in Special Economic Development Zones[12] (SEDZs) located in a few coastal cities, which offered preferential policies to foreign investors, such as tax exemption and paid land usufruct. The land usufruct was modelled after land leasehold system whose principle is that land users could lease land for a certain period of time by paying stipulated land-use fees. Ownership and use right became separable. Shenzhen city (a SEDZ) became the first city in China to implement a land-use system in 1982. The land usufruct regime became a national practice in 1987. The supply of urban land to users is carried out in two ways: (1) Allocation and (2) conveyance, which is also termed as transfer or paid transfer by some authors. Allocated land is assigned to non-profit users, certain state-owned entities and military establishments, while conveyance is used to transfer land use-rights to commercial users by way of an up-front land-use fee that covers the stipulated period of land use according to land use purposes. The term for commercial land, industrial land and residential land is 40, 50 and 70 years respectively. The conveyance of land is transacted at a market price through three methods: Negotiation,[13] public tender and auction. In essence, the urban land market is the

[11] Also known as paid land conveyance system.

[12] At the outset of economic reform, the Central Government gives SEZs special economic policies and flexible governmental measures in order to carry out economic reform.

[13] Negotiation of land-use price was carried out between the governmental agencies, which acted as the representative of land owner (i.e. the state) and potential land users. This method has been phased out in order to make land usufruct transaction more transparent.

land usufruct market. As the land market gradually became standardized, transparency of transaction slowly evolved. For example, the method of negotiation of land-use fees between commercial users and state (the "lessor") has been steadily replaced by more open and transparent measures like tender and auction.

2.1.2 Policies and laws

The Decision on Economic System Reform passed on October 20, 1984 acknowledged that land was not a commodity and used this as a criterion to differentiate the socialist and capitalist commodity market. The 1986 People's Republic of China Land Administration Law[14] (hereafter LAL) further reiterated that land can not be rented or transferred in any form.

With the deepening of the reform and relaxation of the ideological environment, the importance of market mechanisms in the allocation of resources came to be acknowledged by the government. In 1987 the 13th Communist Party Plenum put forward the goal of promoting a socialist market economy, which included the marketization of production factors such as land, as a national policy. The 1998 Constitutional Amendment stated that usufruct can be transferred according to law. A year later in 1999, the People's Republic of China Urban Land Conveyance (or Transfer) Provisions acknowledged the independent economic right of land-use and also the selling and exchange of land. It also acknowledged that land can be given to others gratuitously, and be rented and mortgaged. Free land use was gradually replaced by a paid use right, giving the land user all the rights enjoyed by land owners in a capitalist economy, except for the right to own the land, and the lack of a sufficiently long term of usufruct right.

Since the 1990s, a series of urban land legislation and regulations revolving around property rights, surveying, registration and management as well as the standardization of the land market and the healthy development of the real estate sector has been implemented. Table 2 summarizes a number of key policies and laws regulating property rights.

Table 2 Urban land property right laws and policies

Year	Law / policy	Key points
January 1, 1991	City Housing Property Right Provisions	Strengthened housing property right and protected owners' legal rights.
November 14, 1993	Chinese Communist Party Decision on Market Economic System Reform	Focus on the development and standardization of the real estate market.

(*To be continued*)

[14] Also known as Land Management Law (LML).

(*Continued*)

Year	Law / policy	Key points
January 1, 1994	PRC Provisions on Valued-added Tax for Land	Standardization of land and the real estate market; adjustment and taxation of increases in land value.
January 1, 1995	PRC City Real Estate Management Law	Spelled out the term of paid land usufruct: Residential 70 years, industrial 50 years and commercial and entertainment 40 years.
February 1, 1996	Land Registration Principles	Establishment of land registration, the protection of users' rights.
January 1, 1999 (Amended)	PRC Land Administration Law	The acquisition of land for construction by government departments must also be subject to fees; land use monitoring mechanisms also established.
July 1, 2002	Bidding, Auction on the Sale of Land usufruct for State-owned Land	Land for commercial, tourism and entertainment use must be sold through public tender or auction to prevent under-the-table dealing.

2.1.3 Assessment

The unchallenged position of the state ownership of urban land was inscribed in Clause 3 of Article 10 of the Constitution of the People's Republic of China, last amended in March 2003, which reads that "urban land belongs to the state. It is forbidden for any organization or person to usurp on, buy and sell or transfer land in any other form illegally. Land usufruct can be transferred in accordance with the law." Individuals or other land-occupying entities can have the use right and the extension of that right which includes the right to mortgage, the right to circulate the land usufruct and the right to inherit.

In respect of disposal rights, the state can requisition suburban rural land of collective ownership and convert it into urban land, although the randomicity, and the purview of requisition has been increasingly curbed by the central government so as to avoid discretionary or rent-seeking land expropriation behaviours on the part of government officials. The state can also control the purpose and direction of land use through its General Land Utilization Plan and other related regulations. On the right to derive income aspect, the State's monopoly over the land market means that it gains economic profit from land use right transfers after the establishment of the paid land transfer system.

Users of state-owned land enjoy use right and income right according to the laws and contract signed between government and land users. Once the use right has been granted to the user, user can then sell the use right and gain a profit in

the secondary market. Land users have exchange rights endowed by the state. The market mechanism of tender and auction is used to determine the price[15] of the land usufruct. Thus the urban land market is a market of land usufruct. The mechanism of supply and demand of land usufruct ensures the efficient allocation of urban land resources. Users can also gain economic profit through means such as renting out usufruct. Furthermore users can mortgage their land usufruct and use it as collateral. This can be viewed as a financing channel derived from the use right. Urban land as "dead capital" in the pre-reform era is resurrected and turned into active capital.

The PRC Inheritance Law of 1985 stipulated that housing is the legal property of individuals and can be inherited. According to that principle, land and housing are inseparable, that is the heir can also inherit the land on which the housing is erected for the term of the land usufruct.

Scholars are divided on the question as to what extent urban citizens enjoy comparable property rights when compared with their Western counterparts. From the Chinese government's view point, the two systems are incomparable since China is a socialist country by Constitution and by ideology. Some academics accept this view and treat urban land reform as simply giving bits and pieces of rights to users while the state remains the ultimate owner. But some scholars (for example, Lai 1995) have argued that China has been practising a de facto private property system in the urban area since land-use conveyance was permitted by law in the 1980s. Since the bundle of rights includes: The right to use, the right to derive income and the right to transfer, the right to mortgage and the right to inheritance. Since urban land users in China enjoy all these rights, there is no significant differences in rights between China and the West. The land-use system can be seen as a leasehold system (like in Hong Kong) whose difference from the freehold system in most capitalist countries is that the former has a predetermined period for the bundle of rights.

After economic and land policy reform, urban land has more or less formed a stable and well-established property regime wherein the state as the owner of the land controls the primary market[16] of land, while commercial users enjoy all the rights of land users in a leasehold system and can legally circulate these rights, which specifically include the rights to transfer, rent and use land as collateral in the secondary market. Urban citizens are generally better educated and have a high level of awareness regarding their rights. Therefore, the protection of property rights can be easily enforced. Rural land is a much more complex issue

[15] It is the fee charged for the land usufruct by the state.

[16] The market in which the state's allocation or conveyance (transfer) of usufruct to entities or individuals is known as the primary market; commercial land users, after obtaining usufruct from the state, can circulate use rights in secondary market.

involving the interplay of farmers, the state and the collective. It is also a thornier problem wherein rights enjoyed by users are ambiguous and can be encroached upon rather easily.

2.2 Rural land

2.2.1 Overview

The focus of China's economic reforms since 1949 has been on urban areas. A substantial part of urban growth was paid for by price scissors that favoured urban over rural producers (Oi, 1999). The living standard of many urban residents has reached middle-level developed countries while that of those rural Chinese, who make up the majority of the population[17] lags far behind. The urban bias is ubiquitous in many aspects of life, such as in education, health care, social security, employment security, and last but not least property rights. Since the rural land property rights issue is more complex, diverse and accentuated than the urban land tenure system, as manifested, for example, by rural unrests and conflicts arising from land-related issues in rural China, this article will devote the greater part of it to the study and analysis of the rural land tenure system. Moreover, in contrast to urban residents, land is the primary source of material wealth for the rural population for whom deprivation and lack of security of land poses a threat to their livelihood.

China became the first collectivized agriculture society to break up collectives and returned to a system of individual farming in 1978. The process was completed by 1984, and was known as the "Contracted Household Responsibility System" (HRS). Chronic low productivity and constant food shortage pushed prescient local cadres in some localities to experiment with a system of private plots secretively before it was legalized.

It should be noted that HRS was not an innovation of economic reform. Rather this bottom-up initiative started as early as the 1950s. As soon as the collectivization process started, both local cadres and farmers immediately felt the damage it had on the incentive and morale of farmers. The HRS originally began as a secretive response to collectivization in the early 1950s by Yongjia County in Zhejiang province. Responsibility was taken away from the communes and put back into the hands of individual households. However, it was short-lived in face of the zealous parade towards collectivization. After the Great Leap Forward—a period of extreme agrarian radicalism—HRS resurfaced as a response to the famine that followed it. But again ideology gained the upper hand over practicality

[17] Rural population is about 900 million.

Collective agricultural organization and its intrinsic lack of incentive mechanisms and ten years of catastrophic Cultural Revolution almost brought the economy to a halt and collapse. Under the pressure of a desire for survival and opportunist incentives to exploit the system, some local governments again secretly began to attempt to introduce a private ownership system—the household responsibility system. The remarkable increase in the yields in a number of production teams practising HRS in Anhui Province was hard evidence that even hard-line followers could not deny. After much open debate among economists and political leaders, HRS was adopted and approved by law and implemented over all China starting from the end of December 1978. By 1984, the framework within which HRS worked was also more or less completed. Generally, HRS works this way: The collective remains the owner of the collective land; the collective members rents farmland for a term of 30 years; during the term of contract, the lessee does not need to pay any rent to the collective and the land so leased could be re-leased among collective members during the term of the original lease, subject to the consent of the collective; the quantity of the land to be leased to each household could not exceed the quantity that the lessee had contributed to the collective at the time of its formation more than three decades ago. (Wu, 2000)

2.2.2 Policies and laws

The transformation from collective management to household responsibility was a bottom-up process. Hence it was unavoidable that the new system went through stages of disapproval and partial approval before being eventually approved. Decision on Some Questions of Accelerating Agriculture Development on September 28, 1979 stated that “farmers can not divide up land or carry out household cultivation.” Except for the special needs of some sideline agricultural productions and farmers in remote areas with inconvenient transportation systems, the household responsibility system was outlawed. Further Circular about Questions on Agricultural Production Responsibility System a year later pointed out, “In remote and backward areas, people have lost confidence in the collective and demand the household responsibility production method. The government should respond to this demand and allow it and keep the system stable over a certain period of time. In areas where the collective economy is stable and farmers are satisfied or can be satisfied after improvement with the collective setup, there is no need to implement the household responsibility system”. The 1982 No.1 Central Government Document Rural Work Conference Summary clearly states “any form of responsibility system, be it payment on the basis of work quotas for certain phases of work, the contracting of certain specialized aspects of production, a system of contracted responsibility linking

remuneration to output, is a form of collective production system. As long as the people do not demand any change, the system should remain intact". Central Government No.1 Document Problems of Current Rural Economic Policies pointed out that "people's commune system needs to be reformed from two aspects. That is, the implementation of a responsibility system, especially a system of contracted responsibility linking remuneration to output and the de-linking of economic and administrative powers of the commune". The commune system was subsequently dismantled and was replaced by a contracted responsibility system. (Song, 2000) The Central Government No.1 Document of 1984—Circular about 1984 Rural Work—stipulates that "The term of the land contract period should be more than 15 years. For projects with long production and development cycles such as orchards, forests, barren mountains and wasteland, the term of the contract should be even longer. Before the extension of the contract term, if there is demand among the people to adjust land,[18] the collective can do so provided that it abides by the principle of 'macro stability and micro adjustment'.[19] Land should gradually move into the hands of high-productivity cultivators. During the term of the contract, farmers who become incapable of cultivating the contracted land or move to other trades can hand the contracted land to the collective who will make arrangements accordingly. Given the consent of the collective, farmers can find sub-lessees. However, farmers can not alter the content of the contract at will."

Rural land ownership was clearly defined in the 1982 Constitution. Rural land and suburban land belong to the collective except otherwise stated by law; land sites for rural housing, private plots and privately farmed hilly land also belong to the collective ownership.

2.2.3 Assessment

The adoption of the household responsibility system, which encouraged farmers' enthusiasm for production, was due to the urgent need for an incentive mechanism. Moreover the new system was also in line with the government's desire to restore agricultural production with the goal of economic reconstruction as the centrepiece of reform.

Although HRS does not endow farmers with ownership rights, they possess use right, management right, surplus extraction right and the right to exchange

[18] Land adjustment here refers to the change in the amount of contracted land for each household. It takes place usually in the event of changes in population and natural disasters.

[19] It means that adjustment should be implemented on a small scale, such as among several households, rather on a large scale, such as for the whole village.

under the rules of the collective. Private housing is the only property over which farmers have claim of ownership.

First, rights enjoyed by the state. Since the sate runs a land-use control system, rural land is actually subject to the framework of the state's Annual Land Utilization Plan and Overall Land Utilization Plan. Once included in these two Plans, rural land (including farmland) can be converted for other land use purposes after being requisitioned to become state-owned land. In China, collective land can not be sold to developers. So the land has to be requisitioned by the state to become state-owned before any development project can take place. Once farmland becomes state-owned, farmers lose all rights on the land. Since the Annual Land Utilization Plan and the Overall Land Utilization Plan are designed and approved by the government, the government holds the de facto disposal right of land although the collective is the de jure owner of land. In contrast with urban land, the state does not have an ownership claim over rural land; but the power of eminent domain vested in it by the mere authority of land utilization control makes the state the only and unchallenged legal expropriator of collective land. The Plans are formulated with consideration to issues such as economic development, industrialization, and farmland protection for which national food security issue is the primary concern rather than the sacrosanct issue of tenure security.

State's monopoly over the primary land market implies that the state is the obvious rent seeker that arbitrages between the low purchase price of rural land and high selling price of land use right. The collective or individual farmers are forbidden by law to sell land to developers. As mentioned above, the state first requisitions the land which subsequently becomes state-owned and then it sells the land to developers. Farmers receive compensation for the loss of land.[20] But the payment is usually much lower than land's commercial value. If they were given the right to sell the land on the primary market directly, it is without doubt that farmers would prefer no state intervention. In addition, it is interesting to note how fragile collective ownership can be and the discretion the state has in making collective land state-owned. Apart from the Plans, another tool of

[20] According to Article 47 of the Land Administrative Law (amended in 1998), compensation for requisitioned land has three components: Compensation for land, resettlement compensation and compensation for land attachments and young crops. Compensation for land should be 6 to 10 times the average annual output value of requisitioned land in the preceding 3 years; compensation for resettlement for the population affected is set to equal to 4 to 6 times the average annual output value of requisitioned land in the preceding 3 years. However, resettlement compensation for per hectare of land should not exceed 15 times the average annual output value of requisitioned land in the preceding 3 years. The total amount of land and resettlement compensation, subject to the approval of provincial authority, can increase to no more than 30 times the average output value over the previous three years in an attempt to maintain the living standard of farmers.

discretionary requisition power is so-called public interest-driven requisition. Article 2 of the LAL stipulates that "the state can requisition collective-owned land for public interest purposes." But the definition of "public interest" is nowhere articulated in the Law. In a nutshell, the state has the ultimate disposition right over collective rural land.

Second, rights enjoyed by village collectives. Village collectives have the ownership right to the rural land decreed by law. As the representatives of village collectives, the village economic organization or villagers group has the right to the operation, management and decision-making processes relating to rural land. They are parties that issue the household responsibility contract to farmers. If farmers fail to fulfil their responsibilities under the contract (such as, leaving land idle or waste for more than 2 years), the village economic organization or villagers group has the right to retract the contract right. What's more, according to the state's regulations, village economic organization or villagers group can adjust the land contract right in certain circumstances (such as in the event of serious natural disasters), which are not clearly specified.

Current Constitution and General Principles of Civil Law and LAL all stipulate that rural land, except those that the state can claim ownership of, such as beach and forest, belongs to the collective. But one key question is who on earth is the collective or the legal representative of the collective. These laws do not offer a clear and undisputed definition. According to Article 8 of LAL, rural land is managed and operated by a rural economic organization or villagers committee. After the dismantling of communes, rural agricultural cooperatives as rural economic organizations demised and no alternative collective rural organization has been set up to replace it. Thus, the main body of ownership is absent. With respect to the villagers committees, according to the Villagers Committee Organization Law (Trial) second article, a "villagers committee is a self-managed, self-educated and self-service grassroots autonomous organization". Apparently it is not an economic entity and as a grassroots mass organization it can hardly be designated as the "owner" of rural land. The ambiguity of ownership can cause practical problems. During the state requisition of rural land, there has always been a dispute on the issue whether it is appropriate for villager committee members to negotiate compensation payments and distribute them to farmers.[21]

Third, rights enjoyed by farmers.

(1) Use right. Farmers have the use right of contracted farmland, residential land sites and private plots. According to the current contract term defined by

[21] The authority and influence of village leaders can have an important impact on the claimed "legitimacy" of collective ownership. For a discussion on village leaders and land rights, see Rozelle S and Guo Li (1998).

law, farmers have the contract rights to cultivated land for 30 years, grassland from 30 to 50 years, and forest from 30 to 70 years. On the premise of fulfilling the responsibilities stated in the contract, farmers can decide the kind of crops to cultivate autonomously. However, that autonomy is predicated on conformity with land use purposes in accordance with the land use designations and the regulations of the Land Utilization Plan. For instance, farmers can not dig fishing ponds on designated basic agricultural land nor can they lay land idle or convert it to construction use. With regard to agricultural land, the usufruct right is a constrained use right as farmers do not have full discretion on land use. There is no time limit on the use of residential land sites for rural housing or private plots. However, according to the regulations of LAL of 1999, each household can only apply for one plot of rural residential land.

(2) Right to derive income. The establishment of HRS in 1979 explicitly established the right of farmers to derive income from land. In recent years, in an effort to lighten farmers' financial burdens and raise their income, the government has gradually abolished agricultural tax, withdrawn the agricultural profit retention scheme, and abolished many other forms of fund raising or apportionment.

(3) Transfer right. LAL in 1999 gave farmers the right to transfer the household responsibility contract, which in essence is the use right. The right can be transferred by means of subcontracting, lease, exchange, transfer and other lawful ways. However unlike urban land right transfer, rural land contract transfer involves both bundles of rights and bundles of obligations. These obligations include the stipulated utilization, development, protection of contracted land specified in the original contract and the prohibition of converting farmland into construction land, among others. As obligations are transferred along with the contract, the original contract issuer (the collective) must also be informed of the transaction and give due consent. Law does not forbid the transfer right of rural residential land site, but stipulates that every household can own only one rural residential land site in the village and the transaction of it could only involve residents of the same collective.

The 1986 Supreme Court's Opinions on Hearing of Rural Contract Disputes explicitly ordained that the transfer of a contract is invalid if the transfer does not receive due consent from the contract issuer. Article 37 of the Guaranty Law unambiguously lists the types of properties that can not be mortgaged: Cultivated land, rural residential land sites, privately farmed plots and other properties of collective ownership. These policy directives and laws deter the free circulation of usufruct, and consequently prevent the formation of a rural usufruct market. Some scholars argue these restrictions are meant to protect farmers and maintain rural stability as land is the primary form of social security for the rural population. Land loss may deprive the means of subsistence of farmers and bring about social unrest.

The constraints of formal laws compel farmers to transfer in informal ways such as through oral agreement. Disputes often arise from unwritten contracts. This further deters interested parties from involvement in transfer matters. Moreover, the administration of urban land is principally carried out by the Ministry of Land Resources (MLR), but for rural land, the land administration and land titling is the responsibility of the MLR but the registration of contracted land and contracts falls within the sphere of the Ministry of Agriculture. The overlapping of administrative functions is an institutional failing that needs to be reformed. A purpose-specific government agency should be set up to regulate the transfer of rural land rights and pertinent laws ought to be legislated to promote the activity in the rural land market which will transform the currently "dead" capital into "live" capital.

(4) Absence of mortgage right. The use right of rural land is limited to members of the collective. Consequently, the land contract right, the use right of rural residential land sites and other use rights of rural land lack essential liquidity. Thus rural land is not easily accepted as collateral. The Guaranty Law implemented on October 1, 1995, clearly points out that the use right of cultivated land, rural residential land sites, private plots, private hills and other collective-owned land can not be mortgaged. But there are two exceptions: the usufruct right of waste hills, waste ditches, waste slopes, waste beaches and other wastelands can be mortgaged, if mortgagers obtain consent from the contract issuer; if mortgaged buildings belong to villages (towns) or rustic enterprises, the land on which the buildings are erected can also be mortgaged. It is apparent that farmers do not have mortgage right under the current system.

The 135th Article of the fourth and fifth draft of Property Rights Law (Draft) of the People's Republic of China reads that "the land contract right can be mortgaged if the contractor has stable earnings and obtains consent from the contract issuer. Once the mortgage right is granted, the use of the contracted land can no longer be changed." But, in the sixth draft and the final version, the mortgage right of farmland and land sites for rural housing was prohibited altogether.

The lack of an established market for rural land or the absence of mortgage rights to farmers' contracted land is a divided issue among both scholars and lawmakers. One argument goes that "farmland and housing land sites are the most valuable property that farmers hold and the prohibition of their circulation naturally makes these assets 'dead assets', thereby losing the true meaning that 'property rights' embodies. Such an institutional set-up is not at all conducive to the elimination of urban-rural dualism." [22] Nonetheless, those who argue against giving these rights to farmers maintain that if farmers were allowed to mortgage

[22] Guo Shutian, former director-general of the department of policy and law, Ministry of Agriculture, quoted in Finance Magazine, 2006, 13: 94.

or sell such assets, many farmers would do so either in exchange for credit, the default of which would leave them with nothing, or sell them for cash in the hope of settling down in the cities. Both outcomes will result in a situation that is the antithesis to what the goal of the capitalization of farmers' assets had hoped to achieve. Like many developing countries, China does not have institutional mechanisms in the form of procedures, laws and infrastructures aimed at absorbing rural population in face of fast urbanization. Furthermore, the absence of a social security system means that there is no safety net to shoulder farmers if they lose land as their means of subsistence. Many surplus rural labourers go into cities and find employment as menial workers. This "floating population" can always go back to the countryside and subsist if they still hold a piece of land in case they can not find a job in the cities. Urban slums formed by the land-loss rural poor in many developing countries are a stark manifestation of the permanent damage land loss can cause. It is out of this concern that lawmakers of Property Law decided to prohibit the mortgage of contracted farmland as well as the mortgage and selling of housing land sites.

(5) Inadequate inheritance right. HRS is a household contracting system instead of an individual farmer's contract. The contractor is the household. The loss of some members of the household does not affect the status of the contract. In other words, as long as there is a member (a member with full civil capacity) of the household alive, the contract remains valid and intact. In the case of the death of all members of a household, the contract terminates automatically and the contract issuer takes the back the contracted land. The Legal Committee of the National People's Congress has provided the following explanation: "The household is the basis of the household contracting system. The death of a member of the household will not alter or cancel the contract". (Gu, 2002) Since the situation of the death of all household members is extremely rare, the contract can be regarded as quasi-automatic inheritance within the family. However, those who are qualified to continue to fulfil the contract should be members of the rural collective.[23] One exception to this rule is the contracting of forest and grassland. Since the investment cycle is long, the Rural Land Contracting Law Article 31 allows the legal heir of the contractor to inherit the unfinished contract even if she or he is not a member of the collective.

Since the death of a family member, even the household head, does not invalidate the contract, the income derived from contracted land naturally remains in the household. However, the law is more vociferous and less ambiguous on the inheritance of derived earnings than the inheritance of the contact. Article 4 of the Inheritance Law of the People's Republic of China of

[23] The contracting of collective land is a privilege of members of rural collectives. Urban residents are not allowed to contract a parcel of land.

1985 points out that derived earnings from the contract can be inherited according to this law. The Rural Land Contracting Law asserts that the contractor's earnings derived from the contract can be inherited according to the Inheritance Law. Inheritance here means that the share of income for a particular deceased member of the household can be inherited by the rest of the family members.

3 Attempts to strengthen tenure security

Scholars and government are keenly aware of the problem of tenure insecurity caused by the loss of farmland owing to rapid economic development, urbanization and the consequent conversion of farmland into construction land by the rural collective and township and village enterprises. Apart from this concern, the central government is staunchly committed to food security and self-sufficiency. Protecting farmland is the most straightforward measure to achieve this goal. Related to the farmland protection issue, we can not proceed without talking about regulating government involvement in requisition which is one of the root causes of tenure insecurity. The issues of farmland protection, contracting right reinforcement and measures regulating government officials' behaviour will be discussed in more details in the following paragraphs.

3.1 Farmland protection

The issue of scarcity of land resources is more accentuated in China than other countries. Land per capita in China is only ¼ of the world's average and rapid economic development and urban sprawl is licking up an ever increasing amount of rural land, which threatens food security and environmental integrity. The decreases in the amount of cultivated land over the years and the pressing problem of illegal occupation of cultivated land for non-agricultural construction have drastically increased rural tenure insecurity. From 1986 to 1995, an estimated 6.79 million hectares of cultivated land was converted to other use; among it 21% went to construction projects (Lin, Ho, 2003), which refers mainly to housing projects, industrialization, urbanization and transport facilities. Lin and Ho's study of 1996 Land Survey reveals that state and collective construction projects and farmers' housing sites were responsible for 27.6% of farmland loss (op. cit. 104).

Economic development is a top priority on the Communist Party's agenda. However, the protection of farmland and economic development are two inherently contradictory policy goals: The realization of the former goal constrains development capacity and the realization of the latter goal undermines the former. It is in the interest of both the ruling party and people's general

welfare to avoid compromising one goal for another. Thus a practically unsolvable conundrum exists.

LAL amended and implemented on January 1, 1999 stipulates that the use right of the collective land can not be subcontracted or transferred or used in non-agricultural construction. The government strictly limits the transfer of agricultural-use land to construction land, controls the total amount of construction land, and offers special protection to cultivated land. Provincial, autonomous regional and municipal governments are required to take measures to ensure that the amount of cultivated land does not decline in their administrative district. The Administration on Annual Land Utilization Plan implemented on December 1, 2004 stipulates that the administration of the Farmland Use Conversion Plan must be strictly adhered to. If the quota on farmland use conversion is exhausted, government can no longer approve the conversion of agricultural land into other uses.

3.2 Strengthening of the contracting right

The central government regards the "stabilization of the right of contracting and managing of the land and the promotion of its circulation" to be an important means to raise the level of Chinese agricultural production and to increase the income of farmers. This line of reasoning and policy orientation gradually translates into laws (For more details, see appendix II.).

The Rural Land Contracting Law (RLCL) of 2003 was basically a summary and amalgamation of past policies. The current farmland usufruct right is 30 years in the initial 15 years of contract issued in the first round of contracting which started in 1978 (the contract duration for other types of agricultural land is even longer, for example, for forested land, the duration is 30 to 70 years). The 2002 RLCL and several policies preceding it virtually outlaw all land readjustments except due to "special circumstances" such as natural disasters.[24] This demonstrates the central government's determination in guaranteeing tenure security to farmers. The LAL (amended in 1998) restricts land readjustments by requiring a $^{2}/_{3}$ approval of all village members.[25]

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[24] Despite being prohibited by law, some villages still carry out illegal adjustments. A seventeen-province survey in 2005 by the Department of Land and Real Estate Management, Renmin University of China and Rural Development Institute, Washington found that 499 villages had carried out illegal land readjustments out of the 1773 villages that were surveyed.

[25] Article 14 of LAL contains key provisions in this point: "Within the duration of the contract for the operation and management of land, any appropriate readjustment of the land between isolated households shall be made with the agreement of at least two-thirds of the members of the village assembly or of the representatives of villagers and submitted to the township government and the agriculture administration department of the county government for approval."

3.3 Land titling

Some property rights scholars in the academic circle and in international organizations, such as the World Bank, firmly believe in the land registration and titling process which they deem as the foremost measure to safeguard tenure security. Urban land users in China enjoy a relatively well-established system of registration of land usufruct and housing ownership. Land users and housing owners almost uniformly obtain certificates accordingly. On the contrary, the story for rural land is not so straightforward. Currently, the ownership registration of collectively owned land and the use rights of collective construction land[26] is carried out by land administration agencies under the auspices of MLR, whereas the contracting right of rural contracted land is registered by the pertinent departments of the Ministry of Agriculture. Moreover the registration of forest land is done by relevant departments of the Ministry of Forestry and the registration of housing, grassland, intertidal zones, and water surface used for breed aquatics are each registered by separate authorities. Diversity rather than uniformity in rural registration is the norm. The expected consequence of such a diverse registration system is diversity and unpredictability in the enforcement of laws by respective government agencies and even worse is the problem of an inevitable confusion of ownership/use rights over land and the fixtures on it.

By the end of the 10th Five-year Plan (2001–2005), 85% of state-owned land users and 73% of collective land users had been issued land-use titles. A total of 34,930,000 and 164,510,000 titles had been issued for each respective category. Moreover, 51% of collective land ownership registration and titling has been completed. The government aims to have 95% of the use right for both state and collective land as well as collective ownership registered during the 11th Five-year Plan (2006–2010).

3.4 Regulating the state's discretionary power in land requisition

The People's Republic of China Criminal Law strictly forbids the illegal transfer and arbitrage of land and metes out punishment to illegal occupiers of cultivated land. The 410 Article of the Criminal Law reads "government officials, who practise favouritism and embezzlement, infringe land administration regulations,

[26] It is mentioned in the foregoing paragraphs that rural land must be requisitioned and become state-owned land. Such a process is known as farmland conversion into construction land. However, in some cases, farmland can be converted into construction land without going through this requisition process and remains collective-owned. This sort of construction land is usually occupied by township and village enterprises or used as capital in the joint-venture enterprise between rural collectives and other parties.

misuse of authority, illegally approve land requisition, occupation or illegally lower state-owned usufruct can be jailed for up to 3 years; if the crime causes serious damage to the state or the collective, the sentence can be increased up to 7 years."

Rule of man is gradually replaced by rule of law. Citizens' rights are protected by laws while the government's coercive power and officials' discretionary clout and personal disposition during law enforcement diminishes. In late December 2005, the National People's Congress reviewed the draft of China's first Administrative Coercion Law [27] which strictly laid out the measures and procedures when coercive actions were carried out against citizens' or legal persons' personal or property rights. The purpose of this legislation is to correct the abuse or inappropriate use of coercive power of certain officials. The draft stipulates that citizens, legal persons or organizations that are disgruntled with the enforcement of coercive measures have the right accorded by law to apply for administrative review or file a lawsuit and receive due compensation for damages caused in the enforcement process. The relevant government agencies are also prohibited from using measures like cutting off power supplies, heating in the winter or the water supply when executing their jobs, such as eviction.[28]

4 Concluding remarks: Tenure regimes with Chinese characteristics

In his celebrated book, The Mystery of Capital, De Soto asserted without any reservation that the triumph of capitalism lies in the inherent ability of systems that use land (and other fixed assets) to draw out capital (2000). The foundation of such a capitalization process is the "representational process" of properties—a formal property system with clearly defined and documented rights—which can used as collateral for credit (ibid.) He further attributed the success of capitalism in the West and the failure of it elsewhere to the presence and lack of this "representational process" respectively. This "representational process" that is so central to De Soto's thesis is a legal process that documents and recognizes the property rights of the poor. His concept of "representational process" is a useful guiding concept in examining the evolution and transformation of land tenure in China from a legal perspective.

The impetus of land reform in the post-reform era was to attract foreign investment which brought in capital and provided employment and tax revenue

[27] Xinhua News Agency, 2005-12-25.

[28] These coercive measures were frequently used to evict occupants of land or housing when the state exercises the power of eminent domain.

that furthered economic growth. (Palomar, 2002) The government then invented the paid land use system without jeopardizing the communistic ideology of public ownership. Usufruct "enable citizens to possess, use, and transfer land in the market place." (Wang, 2005) It could be said that there has been established a relatively standardized and well-functioning urban land market[29] given the constraint of ideology thanks to the pragmatic and gradualist approach of the central leadership. Just like the "market economy with Chinese characteristics" the urban land use system is a market-oriented institution but with pitfalls, such as the short length of the stipulated term for usufruct, that are prevalent in emerging economies. The most elemental shortcoming that needs to be addressed and reformed in future legal system reform is the great extent of control exerted by public ownership (state ownership or collective ownership). The fundamental principle of land rights in China is the identification of the state (and less so, the collective) as the absolute owner. (Ho, 2001) All other rights, be it urban or rural land, are derived from this. Therefore, the three dimensions of tenure security—robustness, duration and assurance—are a function of government polices and political goals rather than a set of property rights institutions embedded in laws that regulate the property relations and state's powers. The transition from land as a non-commodity allocated free of charge to users in the pre-reform era to a market commodity in the post reform era, where urban land users' rights are recognized by law, registered and titled. This transition, in the authors' opinion, is equivalent to De Soto's representational process.

The "representational process" in the rural area was much slower and incomplete and is still an evolving one. The HRS can be regarded as a type of institutional regime wherein collective ownership is not a situation of open access but "resource ownership residing in the larger community, with use rights allocated to its members" (Kung, 1995), according to existing regulations and laws. In about five decades—from 1949 to 1997—rural land tenure went through three stages of dramatic transformation: The privatization of land to collective ownership and eventually to a contracted land use system. As we have examined above, rural usufruct are incomplete and insecure in many aspects, most

[29] This is not to say that the urban land market is a perfect one. There exist problems, for instance, no national regulations or laws exist for the exact procedures of public tender or auction of urban land (Palomar, 2002). Therefore there is a leeway for local governments to set their own rules. Notwithstanding these defects in the current urban land tenure regime, the Chinese government's urban land reform is a success. More encouragingly, the government has not seen the benefit of the reform and will not retreat from the current system, but embarked on a pragmatic approach to further ascertain and legalize property relations. The Property Rights Law of 2007 includes a provision that gives automatic renewal for urban residential housing land upon the expiration of 70 years of use term.

prominent of which is the lack of a mortgage right, the absence of a land market for land transactions,[30] and the lack of usufruct rights for a sufficiently long period of time. These revelations beg two very important questions: First, whether land assets are held in "defective forms", second, is the Chinese process—started in 1978—a too slow "representational process?" Despite the shortcomings of rural tenure regimes, predominantly the lack of a mortgage right, which is essential in transforming the "dead assets" of farmers into "active capital", Chinese farmers enjoy a stable and relatively long term of holding rights and income right and to a great extent inheritance right of their land. In addition, there are genuine efforts by the government to make tenure more secure, such as prohibiting discretionary land area adjustments by village cadres so as to guarantee the contracted land area. Farmers receive due compensation, which should keep their current living standard intact in the event of state expropriation as enshrined in LAL. Tenure insecurity is often cited as a cause of low investment in land, which in turn adversely affects grain production. Since China adopted the HRS system, the rise in grain production fluctuated between 332 and 387 million tons during the period 1979–1983. (Zhang, Li, Shao, 2006) Then grain production plateaued until the late 1980s and rose again significantly in the early 1990s.[31] And some empirical studies have shown that although tenure security has a positive impact on investment, it is not correlated with grain production in China. (Jacoby, Li, Rozelle, 2002)

When Central and Eastern European and Former Soviet countries renounced communism in the 1990s and when international financial institutions and bilateral donors introduced structural adjustment polices and lending polices that focused on the rule of law since the 1980s, land law reform that aimed at revolutionizing the property system has become the centrepiece of development strategy. The formalization of property rights and the promotion of law in these regions were introduced as the foundation of economic and political reform. In sharp contrast, the rule of law evolves as economic and political conditions evolve over time in China. China did not adopt a rule-of-law "shock therapy".

Compared to countries in these regions, there are three distinct features of the Chinese tenure regime. Firstly, the rule of law (for tenure regime) was not established immediately at the start of the reform programme but rather it evolves gradually from policy directives as economic conditions called for

[30] As Peter Ho noted in the Introduction of Development Dilemmas, "Despite a regulatory vacuum, the free transfer, sale and mortgage of rural usufruct has become a commonplace in wealthy and coastal regions of China".

[31] The rise in production in the late 1970s and early 1980s is primarily attributed to the HRS while the rise in the 1990s is mainly because of the rise in the price of agricultural products.

changes, and formal property laws only came into existence in 2007. Secondly, China did not start privatization and land redistribution process, instead the central government improvised and adapted tenure regimes to communist ideology as well as to the market economy: Maintaining state and collective ownership of urban and rural land respectively while granting partial land rights to users for a long period of time. Thirdly, and a point which this paper has only paid scant attention to, is that the reforms, both rural and urban, were more a result of bottom-up initiatives rather than top-down directives. For instance, the HRS was experimented with in some localities before it was approved by the government as legal. When the central government saw HRS as inevitable and conforming to its economic policy goals, it simply legalized it. The 30-year contract for rural land was also in part a response to the demand for tenure security from farmers. Therefore the ingenuity of grassroots innovations in many instances propels land policy, provided that it is line with economic policies and can fit, albeit awkwardly in some cases, into the evolving framework of communist ideology.

Deng Xiaoping, the father of modern China's reform, once said, "It does not really matter whether it is a black or white cat, as long as it can catch the rat." What he implies is that the achievement justifies the means. It can be expressed succinctly in politico-economic terms:

> The Indirect Theorem of Welfare Economics (often called the Second Welfare Theorem) tells us that for any given arrangement of property rights and endowments, competitive markets will sustain a Pareto optimal allocation of resources. The choice of property regimes—more correctly, the choice among a complex of institutional arrangements pertinent to agriculture, of which property regimes are but one element—is a matter of social commitment to alternative *Pareto-incomparable* futures. (Bromley, 2005)

The Chinese case provides an illustrative and workable alternative model[32] of land reform and the transformation of property relations in a developmental context. It is exemplary of how the rule of law comes about as a desirable consequence of development rather than being misconceived as a path to development.

[32] An alternative to formalized property rights system propagated by neo-liberalism.

Appendix I Laws aimed at farmland protection

Time of introduction or implementation	Laws/ policies	Essential points
Implemented on July 2, 1993	Agricultural Law of the People's Republic of China	Local governments at or above the county level should demarcate the basic farmland protection areas, and implement special protection regulations on the cultivated land within the basic farmland protection areas.
Implemented on January 1, 1994	Basic Farmland Protection Regulations	a. Basic farmland is either defined as cultivated land in the basic farmland protection areas or farmland that can not be used for other purposes in a certain period of time given the population's demand for agricultural products and the forecast of construction land demand. b. Once the basic farmland protection areas are demarcated, any unit or individual shall not change the land use. c. In the case where permitted non-agricultural construction land occupies cultivated land in the basic farmland protection areas, the principle of "an area equal in size to the occupied area must be reclaimed" must be applied. That is, the unit or the individual who occupies the land is held responsible for reclaiming the same amount and quality of land. d. It is forbidden for any unit or individual to leave basic farmland idle or waste. If land is laid idle or waste for two consecutive years, the use right of the land can be retracted and the registration certificate be cancelled after the land administration department of the county government has gained permission from the county government. If contracted land in the basic farmland protection areas is abandoned by contractors, the contract right can be taken back by the collective economic organization.
Amended and implemented on January 1, 1999	Land Administration Law of the People's Republic of China"	a. The state abides by the land-use control system. The government strictly limits the conversion of agricultural-use land to construction land by controlling the total amount of construction land and offering special protection to cultivated land. b. The state abides by the policy of basic farmland protection. It is forbidden to use the basic cultivated land for orchards or fishing ponds.

Appendix II Laws and policies aimed at strengthening farmers' contract right

Time of introduction/ implementation	**Laws/ policies**	**Essential points**
November 5, 1993	On a Number of Agricultural and Rural Economic Development Policies and Measures	a. An extension of 30 years when current contracts expire. b. Implementation of the principle of "unchanged contracted land area regardless of household population fluctuations" during contract period. This is aimed to preserve the size of contracted land during contract term. c. Respecting the wishes of peasants and implementation of moderate scale of farm-size operation.
Implemented on July 2, 1993	Agricultural Law of People's Republic of China"	Unless otherwise stated in the agriculture contract, the contractor has the right to make decisions on operation and enjoy the income from and the disposal right of the produce of the land. The contractor must fulfil contractual obligations. During the contract's effective period, the contractor can transfer the contracted land, mountains, grasslands, wasteland, beach and water or the use right to a third party upon agreement with the party that issues the contract (i.e. the collective).
May 6, 1995	Opinions on Stabilizing and Improving Land Contract Relations	When prolonging the term of a land contract and carrying out necessary land area adjustments, it's forbidden to raise contract fees at will or increase farmers' financial burden in any disguised form.
August 27, 1997	Circular on Further Stabilizing and Improving the Rural land Contract Relationship	After prolonging the land contract term, the administrations of the town government governing the contract must issue certificates of contract and management right of land in time which is printed by the governments at or above the county level.
Amended and Implemented on January 1, 1999	Land Administration Law of the People's Republic of China	a. The term of the right of contracting and managing of the collective is extended to 30 years. b. During the term of the contract, the adjustment of land size for some contractors must be approved by more than two-thirds of the members of the villagers' committee or by more than two-thirds of village representatives.

(*To be continued*)

(*Continued*)

Time of introduction/ implementation	Laws/ policies	Essential points
Implemented on March 1, 2003	Rural Land Contracting Law of the People's Republic of China	a. The contract term of farmland is 30 years. The contract term of grassland ranges from 30 to 50 years. The contract term of woodland is from 30 to 70 years; the contract term of special woodland can be prolonged after the authorization of forestry administration departments of the State Council. b. Local governments at or above the county level should issue certificates of land contract or woodland contract to the contractor, register them, and verify the land contract right. c. During the contract term, the adjustment of contracted farmland and woodland among some villagers due to natural disaster destructions must be approved by more than two-thirds of the members of the village committee or more than two-thirds of village representatives. d. The contractual right obtained through household contract system can be legally circulated by means of subcontracting, leasing, interchanging, transfer and so on. The rural land contract right obtained through bidding, auction and negotiation can be legally circulated by means of transfer, leasing, shareholding, mortgaging and so on after the issuance registration certificate. e. The contractual right obtained through bidding, auction and negotiation offers the right of inheritance to both the land and income derived from it in an event of the death of the contractor.

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